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UPREME COURT, U. S.

70-286

~~No. 1631~~

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1970

IOWA BEEF PACKERS, INC.,

Petitioner

v.

EDWARD D. THOMPSON
(and 13 other individuals),

Respondents.

REPLY BRIEF FOR PETITIONER ON PETITION FOR WRIT OF CERTIORARI

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IOWA BEEF PACKERS, INC.,

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

REPLY BRIEF FOR IOWA BEEF PACKERS, INC.

I

The crucial issue here is *a policy* determination in harmony with the procedures formulated by this Court in a national labor relations policy. That issue is largely submerged in the Respondents' Brief.

Respondents' Brief (p. 12) leans heavily on *Wilko v. Swan*, 346 U.S. 427 (1953) and on the Steelworkers trilogy. That reliance is misplaced. Witness these statements by Mr. Justice Douglas in *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960), following his brief review of *Textile Workers v. Lincoln Mills*, 353 U.S. 448 and Section 301 (a) of the Labor Management Relations Act:

> Thus the run of arbitration cases, illustrated by *Wilko v. Swan* became irrelevant to our problem. (p. 578).

> In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail . . . (p. 584, 585).

And in the dissenting opinion in *Wilko v. Swan*, Mr. Justice Frankfurter wrote:

> Arbitrators may not disregard the law. Specifically they are, as Chief Judge Swan pointed out, "bound to decide in accordance with the provisions of section 12(2)." *On this we are all agreed.* (Our emphasis). (p. 440 of 346 U.S.)

That was a Securities Act case. So, here, in accordance with the Fair Labor Standards Act. And in *Republic Steel Corporation v. Maddox*, 379 U.S. 650 at 659 (1965) Mr. Justice Harlan stated: "Any such doubts must be resolved" in favor of arbitration.

To like effect, favoring arbitration and the supremacy of L M R A Section 301, see *Vaca v. Sipes*, 386 U.S. 171 (1967), at 184 (citing *Maddox)* and at 191; *Boys Markets v. Union*, 398 U.S. 235 (1970); and the opinions by Mr. Justice Harlan in June, 1971, in *Amalgamated Association v. [redacted]ckridge*, _____ U.S. _____, 29 L.Ed 2d 473 at 484, and in *Bivens v. Six Unknown Agents*, _____ U.S. _____, 29 L.Ed 2d 619 at 631 (citing *Lincoln Mills*).

II

> Respondents' Brief misconceives the nature and extent of employees' rights under the Fair Labor Standards Act (FLSA).

Nothing in Petitioner's position or in our Brief runs counter to the decisions of this Court under FLSA. We do not claim waiver or compromise or exemption or anything else in defiance of substantive rights under FLSA. Indeed, we assert the arbitrator's *duty* to apply the FLSA provisions. See also Division I of this Reply Brief.

Respondents beg the "Question Presented" (their Brief, p. 2) by assuming "the unqualified right of employees to sue". Actually, that right is rigidly qualified in law under FLSA and is seriously restricted in practice and in fact, as their own Brief testifies (pp. 6 and 7 and note 4); unlike the Seamen's Act in *Arguelles*, (which made no provision for administrative enforcement), the Secretary of Labor takes over the whole of FLSA enforcement except for the *"Very few of these suits"* brought by employees (n. 4). (Our emphasis).

Given a Collective Bargaining Agreement (which affords rates of pay far in excess of those required by FLSA), the very opinions of this Court cited by Respondents distinguish our case. In *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1946), this Court said that the legislative history of FLSA "shows an intent on the part of Congress to protect certain groups of the population from sub-standard wages *** due to the unequal bargaining power as between employer and employee . . ."; so, too, in *D. A. Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946).

Moreover, except for the small minimum wage guaranteed, the courts recognize that FLSA actions are actions on contract. *Republic Pictures Corp. v. Kappler* (cited by Respondents, Brief p. 11), 151 F.2d 543, aff'd per curiam 327 U.S. 757 (1946) states:

> The action for overtime under the statute is an action on contract; at least, the Federal statute is bottomed upon a contract of employment. As said in *Northwestern Yeast Co. v. Broutin*, 6 Cir., 133 F.2d 628, "The Federal statute is premised upon the existence of an employment contract **** The action for double compensation may be considered as debt or as an action for wages due under the employment agreement."

III

Respondents' rights rest *simply* on the Collective Bargaining Agreement; those rights (work-free lunchtime) are *not* found in FLSA.

Respondents' Brief (p. 8, lines 7 and 8) concedes, as it must, that "the statute (FLSA) makes no provision for a 'work-free lunch-time'." Thus, in effect, Respondents concede our Petition, though they assert "It matters little." We say it matters much; it is the key to this case. The contract, and only the contract, awards the right.

Also, Respondents will recall and will not deny that the "Findings" by the Trial Court in this case (Iowa Supreme Court "Record", p. 44, lines 12-16) included this:

> It appears to the court that this is a matter that could and should be taken care of under the terms of the contract of employment of the company with the union and its members.

IV

Respondents' Brief misconceives the application of the U. S. Arbitration Act of 1925.

Respondents' Brief (pp. 12-15) devotes much space to the United States Arbitration Act of 1925, in an effort to distinguish the four United States Circuit Courts of Appeals FLSA cases on which we rely.

In reply, it should suffice to refer to our quotation, in Division I of this Brief, from Mr. Justice Douglas in *Lincoln Mills* that "the run of arbitration cases **** become irrelevant to our problem." In view of the supremacy of L M R A section 301, as interpreted by this Court, the Arbitration Act becomes secondary for these purposes.

Our references, in our Petition, to the Arbitration Act were designed to demonstrate that Congressional concern in favor of arbitration dates back at least to 1925, thus antedating the 1938 FLSA by some 13 years.

CONCLUSION

For the reasons stated in our Petition and in this Reply Brief, we respectfully submit, our petition for a writ of certiorari should be granted.

Respectfully submitted,

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